No. 12298

IN THE UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, a Corporation,

Appellant,

v.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellee.

REPLY BRIEF FOR THE APPELLANT

Upon Appeal from the District Court for the Territory of Alaska, First Division

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This brief has been prepared principally as a reply to the brief for the United States as *amicus curiae,* and for convenience of reference, the arguments advanced by *amicus curiae* will be discussed under the appropriate headings of that brief, with specific reference to appellee's brief wherever necessary.

PRELIMINARY CONSIDERATIONS

In describing the interest of the United States in this controversy, and elsewhere throughout the brief, *amicus curiae* has referred to the alleged undesirable effect upon the Territory of Alaska if the Alaska Net Income Tax Act should be held invalid. Generalizations are offered to the effect that maintenance of law and order, public health, etc., would suffer seriously and adversely and that it might become necessary to call upon Congress for assistance in these respects.

For the purpose of clarifying the atmosphere in which this controversy exists the attention of this Court is invited to the fact that the record in this case contains not a single word of testimony or evidence even remotely bearing upon

these matters and, accordingly, they could properly come before this Court only upon the ground that judicial notice may properly be taken of them.

We do not think that these are appropriate matters for judicial notice, but if they are then the actual facts may be summarized as follows:

1. According to a special report of the Territorial Senate Finance Committee, which was never published in the Senate Journal, the Alaska Net Income Tax was budgeted to produce, at the very outside, not to exceed 15% of the cost of operating the Territorial government for the biennium ending April 1, 1951.

2. The total Territorial appropriations for Alaska by Congress for the current fiscal year are $218,519,000, plus an additional contract authority of nearly $30,000,000.[1] If this fiscal year appropriation were translated into a biennium to conform with the appropriations of the Territorial legislature then only 5% of the cost of operating the Territorial government is borne by the Territory and only 15% of that 5% would be derived from the challenged income tax law.

3. With respect to law and order there are four principal agencies in the Territory charged with the duty of enforcing the laws and maintaining order. These are United States Marshals and their deputies (who unlike United States Marshals in continental United States are also peace officers and constables and are charged with the enforcement of law and the maintenance of order within the Territory) who are paid wholly from Federal funds appropriated annually by Congress; municipal police forces, the cost of which is defrayed by a general tax imposed upon municipal prop-

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[1] Report of Delegate E. L. Bartlett, Delegate to Congress from Alaska, October 26, 1949.

erty for that purpose (approximately 75% of the permanent population of the Territory resides within the limits of some municipality); the Territorial Highway Patrol, the cost of maintaining which is defrayed from a special fund in the Territorial Treasury which is supported by a tax of 2c per gallon on all motor fuel; the United States Fish & Wildlife Service and its employees who are paid entirely from funds appropriated annually by Congress.

4. With respect to public health the situation is similar to that of the law and order agencies described above. The territorial Department of Health is financed almost entirely by Federal funds and Congress is presently appropriating earmarked funds for the Territory for public health purposes at the rate of almost $3,000,000 per biennium.

Measured by these, the specific facts, the generalizations set forth in the brief of *amicus curiae* appear to be somewhat exaggerated.

ARGUMENT

The Following Arguments Advanced by *Amicus Curiae*, and to Some Extent by Appellee, Do Not Furnish Adequate Legal Support for the Challenged Provisionss of the Alaska Net Income Tax Act and Do Not Answer the Contentions Made by Appellant in its Opening Brief.

A. That the Organic Act Vested the Legislature of Alaska with the Plenary Taxing Power of Congress Over the Territory.

It is here suggested by *amicus curiae* that the Organic Act of Alaska, Act of August 24, 1912, c. 387, par. 1, 37 Stat. 512, 48 U.S.C.A. par. 21 *et seq.* conferred upon the Territorial legislature all of the taxing power which Congress possessed and that, therefore, the only limitations upon the taxing au-

thority of the Territorial legislature are the limitations upon the taxing power of Congress. *Alaska Fish Co. v. Smith,* 255 U. S. 44, *Pacific Fisheries v. Alaska,* 269 U. S. 269, and *Kitagawa v. Shipman,* 54 F. (2d) 313, cert. den. 286 U. S. 543, are cited in support of this proposition. However, analysis of the opinions in these cases will readily disclose that legislative authorizations contained in Territorial organic acts similar to the Alaska Organic Act have been construed to confer upon territorial legislatures powers of legislation, including taxation, analogous to those possessed by state legislatures.[2] Implicit in this view is the recognition of the desirability of limiting the legislative powers of territorial legislatures in the same manner and to the same extent as in the case of state legislatures. That is a far cry from the view of *amicus curiae* that the Territory possesses "a legislative power identical with the full power to tax inherent in Congress over a territory," and it certainly does not establish that even if the legislature possessed such power it could delegate it back to Congress. Surely Congress could not delegate to the legislature or any other body the responsibility of making federal laws.

B. That the Challenged Statute Does Not Improperly Delegate to Congress the Legislative Power of the Territory.

The brief of *amicus curiae,* and to some extent that of appellee (page 14), concedes that the authorities cited by appellant in its opening brief[3] uniformly hold that attempts to delegate legislative functions in circumstances parallel to those presented by the statute here in question are invalid

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[2] *Hornbuckle v. Toombs,* 18 Wall. 648, 655:

"The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature."

[3] See pp. 16, 17 of appellant's opening brief.

and have the effect of making the statute invalid. No apposite authorities are cited to the contrary and the briefs content themselves with four wholly unconvincing arguments in an attempt to divert attention from the clear-cut mandate of the decided cases holding such attempted delegations to be invalid.

1. That the Alaska Net Income Tax Act attempted to adopt by reference only existing provisions of the Internal Revenue Code.

This statement is literally a contradiction in terms of the express language of the statute and finds no support in any of the cases cited by appellee or by *amicus curiae*. Indeed, much of the argument in other portions of these briefs is directed to an explanation of the practical advantages of a Territorial income tax law which automatically conforms with the Federal income tax law. Unless words have lost their ordinary meaning, it must readily be conceded that the Territorial legislature attempted to adopt by reference not only the Internal Revenue Code as it then existed but the Internal Revenue Code "as hereafter amended."

2. That there are persuasive political reasons for recognizing the validity of such an attempt at delegation.

The question before this Court is not whether there are good reasons why the Territorial legislature should be placed in a position where it could incorporate by reference future amendments of the Internal Revenue Code but whether, in the present state of the law, it is permissible for the legislature to do this. Certainly the Congress and the people of the United States are the proper forums in which to urge the desirability of this objective, and it is authority in that field to

which *amicus curiae* resorts rather than apposite authorities in the judicial field. Regardless of views about conceptualism this is a line of demarcation which all courts have carefully observed and no proposition is better established in our law than that which confines the litigant to his forum and forbids consideration of those matters of policy which transcend the judicial function.[4] Thus, the reports of congressional committees considering the advisability of legislation designed to implement uniform federal-state taxation and books and articles published in support of that objective do not in any way weaken or detract from the cases which declare that such an attempt at delegation as that presented by the Alaska statute cannot stand.

There are cogent reasons for the adherence of the courts to the basic proposition. The real objection to an attempt at delegation such as that involved in the present controversy is the fact that it is inconsistent with the responsibilities of representative government in a republic such as ours. Underlying the condemnation of such attempted delegation is the firm conviction that in a representative form of government those who have been chosen by the people to act for them should not be permitted to abdicate that responsibility by merely referring it to another body operating independently and not as the representatives of the constituency. When the cases have spoken of "sovereignty" as the reason for the rule it has been a verbal shortcut (entirely apposite in the case of states) to the expression of this more fundamental reason.[5]

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[4] *Iselin v. United States,* 270 U. S. 245.

[5] *State v. Intoxicating Liquors,* 121 Me. 438, 117 A. 588; *Ruggles v. Collier,* 43 Mo. 353. In the latter case the court said:

> "Legislative power implies judgment and discretion upon the part of those who exercise it, and a special confidence and trust upon those who confer it."

As applied to the Territory of Alaska there is no greater justification for recognizing an abdication by the elected representatives of the residents of Alaska to the Congress, none of the members of which are elected by the residents of the Territory, than in the case of states. It would, indeed, be ironic to say in one breath, as the courts have, that the Organic Act for territories creates, in effect, an autonomy and a legislature with powers and authorities paralleling those of states and in the next breath to deny that the same responsibilities exist for determining purely local legislation.

3. That appellant has no standing in Court to raise the objection of invalid attempt to delegate.

In the face of *Allen v. Regents of the University System of Georgia,* 304 U. S. 439, we do not understand how this proposition can seriously be urged in this case. In that case the University of Georgia and the Georgia School of Technology acting through the Board of Regents, challenged the validity of the Federal Admissions Tax imposed upon admissions to athletic events, to be paid by the purchaser of the admission and required to be collected by the seller of the admission and subsequently paid over to the Collector of Internal Revenue. To the objection that the Board of Regents had no standing to challenge the taxing act as applied to the state schools, the court said:

> "We hold that the bill states a case in equity, as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the government's effort to enforce payment."

Similarly, in the present case, appellant is required to collect a tax from its employees and to pay that tax over to

the Territory. Severe penalties are provided for failure to comply with these requirements. The Territory had demanded payment of the tax from appellant and had threatened to proceed with the imposition of penalties upon appellant's refusal. Meanwhile, appellant had been enjoined from paying over to the Territory the tax withheld on the wages of its seamen. It, therefore, became necessary for appellant to test the validity of the statute in which the withholding requirement was contained. As the Supreme Court said in the *Allen* case "upon the showing made," the appellant was unable by any other proceeding adequately to raise the issue of the validity of the statute.

4. That the severability clause may properly be applied to save the statute by eliminating the references to future amendments of the Internal Revenue Code.

As applied to this portion of the statute, we think there is no basis whatever for the argument that if the legislature had foreseen the invalidity of the incorporation by reference of future amendments to the Internal Revenue Code, it would have intended the balance of the statute to remain in effect. As *amicus curiae* has so ably shown (pages 21-30) the purpose of the incorporation by reference was to achieve economy and simplicity for the Territorial income tax law and this could only result where the Federal income tax returns and the Federal audits could be used each year as the basic tax computation. If the rule of severability were applied this result could not be attained because, following any change in the Federal income tax law, there would be no basic computation which the Territory could use under its statute to fix the amount of tax. Obviously, then, if the legislature had foreseen such a consequence it would have enacted an income tax law like those of Hawaii and Puerto Rico, pat-

terned after the Federal income tax law, and which could stand independently on its own feet.

C. That the Challenged Statute Does Not Improperly Delegate to Administrative Officers the Legislative Power of the Territory.

1. That the statute makes no improper delegation to the United States Commissioner of Internal Revenue.

Section 3 of the statute provides that *unless and until* the Territorial Tax Commissioner promulgates regulations of his own the regulations of the Commissioner of Internal Revenue shall be the regulations for the Territory. Hence, in the first instance, the Federal regulations do necessarily and automatically become the local regulations. Moreover, the regulations which the Act seeks to incorporate by reference are those presently existing and those hereafter promulgated. Taken together with the attempted incorporation by reference of future amendments to the Internal Revenue Code this "is delegation running riot." Possibly the incorporation by reference of the regulations of the Commissioner of Internal Revenue standing alone would not constitute an improper delegation as suggested by the Supreme Court of Puerto Rico in *Irizarry v. District Court,* 64 P.R.R. 90, cited in the brief of *amicus curiae,* but when considered in connection with the delegation to Congress the entire scheme exceeds the permissible limits of delegation.

2. That the statute makes no improper delegation to the Territorial Commissioner of Taxation.

The brief of *amicus curiae* with respect to this point falls considerably short of meeting the issue. Appellant's conten-

tion is simply that a legislature cannot delegate to an administrative officer the authority and responsibility of creating statutes of limitations which is exclusively the function of the legislature, or delegate to the Administrator the responsibiliy for determining the legality of tax assessments and collections, which is the function of the judiciary. The cases of *Yakus v. United States,* 321 U. S. 414, and *Bowles v. Willingham,* 321 U. S. 503, cited by *amicus curiae,* involving the Emergency Price Control Act are not in any manner inconsistent with those propositions. The Emergency Price Control Act, as pointed out by the Supreme Court in those cases, contained its own statute of limitations and, with respect to the adoption of regulations to be promulgated pursuant to the Act, expressly provided for quasi-judicial hearings before the Administrator and review in the Emergency Court of Appeals, and if need be, the Supreme Court, before the detailed regulations became effective. Thus, the Act of Congress considered in those cases itself supplied the precise provisions of law which are here attempted to be delegated to the Territorial Tax Commissioner.

D. That the Challenged Statute Is Not Invalid for Indefiniteness or Uncertainty.

We agree with *amicus curiae* that a taxing act is not invalid because its terms may in the future be modified. Nevertheless, we still submit that when neither the Territory, nor the taxpayers subject to the Territorial income tax, have any control whatever over the body to which has been delegated the function of making the law then indefiniteness and uncertainty results so far as both the Territory and its taxpayers are concerned.

E. That the Challenged Statute Does Not Violate the Uniformity Clause of the Organic Act.

With all deference to the Court of Appeals for the First

Circuit and its opinions in the cases of *Ballester-Ripoll v. Court of Tax Appeals of P.R.,* 142 F. (2d) 11, *South Puerto Rico Sugar Co. v. Buscaglia,* 154 F. (2d) 96, and *Rullan v. Buscaglia,* 168 F. (2d) 401, cited by *amicus curie,* we submit that the better reasoned view is that the uniformity requirement of the Alaska Organic Act which is set forth in Section 9 of the Act as a limitation upon the taxing power of the Territory, means precisely the same thing as parallel provisions of state constitutions. The reason for this is apparent. In enacting organic acts for territories Congress is taking the first step toward ultimate statehood and it seems utterly incongruous to suppose that in taking its place along with the other local subdivisions of the United States it was intended that the Territorial power of taxation should be different from those of states. In this light the authorities cited by appellant in its opening brief (page 22) are clearly in point.

There was no Federal graduated net income tax law in 1912 when the Organic Act for Alaska was enacted. The decision of the Supreme Court in *Pollock v. Farmers Loan & Trust Company,* 157 U. S. 429, was still fresh in the mind of Congress and the Sixteenth Amendment was not yet adopted. Therefore, to say that Congress intended to confer upon the Territory the power to enact a graduated net income tax is unbelievable. If, subsequently, Congress desired to extend this power to the Territory it could have done so by a simple amendment to the Organic Act. The omission to do so will not be supplied by the judiciary. *Iselin v. United States,* 270 U. S. 245; *L. P. Steuart & Bro. v. Bowles,* 322 U. S. 398.

F. That the Criticized Classifications Made by the Statute Were Well Within the Area of Legislative Discretion, and Were Not Arbitrary Nor in Denial of Due Process.

It is probably true, as *amicus curiae* indicates, that the Civil Rights Act incorporating all of the limitations of the

Fourteenth Amendment with respect to taxation and expressly extending those limitations to territories as well as states does not actually add anything to the limitations which the courts have, without reference to that Act, recognized and applied to territorial tax legislation. We think the generalization "palpably arbitrary" has actually been applied in such a manner as to strike down taxing statutes which discriminate in favor of one as against another of the same class, or, stated differently, where no reasonable basis for the discrimination appears. However, if that is not the proper view of the "palpably arbitrary" test then we renew our contention that the Civil Rights Act which has been overlooked in other territorial tax cases is applicable here and requires the present statute to meet the test of the Fourteenth Amendment.[6]

At this point we must invite attention to an obvious, although doubtless inadvertent, error in the fact statement made by *amicus curiae* with respect to appellant's employees who are subject to the withholding provisions of the Alaska statute. The brief states that "appellant's employees were either residents of Alaska, with respect to whom no question of apportionment is involved, or seamen, in whose case an apportionment formula is expressly provided." This is, of course, contrary to the record which clearly establishes a third group of employees, i.e., shore-side employees resident

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[6] In *Martinsen v. Mullaney,* the District Court for the Territory of Alaska, First Division, No. 6095-A, July 29, 1949 (subsequent to the decision by that court in the present case) recognized the applicability of the Civil Rights Act to Territorial tax legislation and invalidated the tax there in question upon the ground that the discrimination involved violated the requirements of that Act which were, at least, as restrictive as the Fourteenth Amendment.

See, also, the decision of this Court in *County of San Mateo v. Southern Pacific Railway Co.,* 13 F. 145.

in Seattle who annually go to the Territory and perform services therein for appellant (R. 90).

Bearing these considerations in mind it is clear that the question of the validity of the apportionment formula contained in Section 5-B of the Alaska statute and the failure to provide any allocation for these employees of appellant is clearly before the Court in this case, and just as clearly neither appellee nor *amicus curiae* have advanced any conceivable basis for that discrimination. The fact is that none exists. Possibly this was the result of inadvertence, but whatever the cause the statute must fail because of the discrimination.

Similarly, there is no conceivable reason why taxpayers enjoying the benefits of net operating loss carry-overs pursuant to Section 122 of the Internal Revenue Code should, in the present taxable year, receive different treatment under the Alaska law than those who did not have such net operating losses.

The same is true with respect to the unused capital loss carry-over provided for by Section 117(e) of the Internal Revenue Code.

G. That the Provision for Suspension of Licenses to Do Business as a Penalty for Non-Payment of the Income Tax Was Not Unconstitutional.

As a practical proposition we cannot see what difference it makes whether the law provides for forfeiture of the Territorial license to do business upon non-payment of tax or whether the law provides that the payment of the tax is a condition to the carrying on of business in the Territory. In either event the payment of the tax is a condition to carrying on interstate commerce and the fact that the impact of

the condition will be felt by the taxpayer only after the first tax payment date has arrived does not get around the rule which was summarized in *Memphis Natural Gas Co. v. Stone,* 334 U. S. 314.

CONCLUSION

For the foregoing reasons, it is respectfully submitted: (1) that the decree of the district court should be reversed to the extent that it holds that chapter 115, Session Laws of Alaska, 1949, is a valid Act; that the term "continental shelf" as used in section 5-B(1) thereof may be severed from the Act without affecting the remainder of the Act; and that section 16 of chapter 115, Session Laws of Alaska, 1949, ratified and confirmed the withholdings of income taxes made pursuant to chapter 3 of the Laws of the Extraordinary Session, Alaska, 1949, and (2) that the case should be remanded to the Court for entry of a decree permanently enjoining appellee as prayed for in the original and supplemental complaints filed herein.

Respectfully,

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